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87-1184

No. _____

In The

Supreme Court of the United States

October Term, 1987

SAMUEL MORRIS CURRY
and
RAMONA MARSHALL,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT OF APPEALS PLAINLY VIOLATED THE RIGHTS OF THE PETITIONERS TO CONSTITUTIONAL DUE PROCESS OF LAW BY DELIBERATELY MISQUOTING THE FACTS UPON WHICH THE DECISION OF THE COURT OF APPEALS HAD TO TURN, AND IN FACT BY ADDING TO THE AFFIDAVIT FOR A SEARCH WARRANT BEING REVIEWED, LANGUAGE WHICH WAS NOWHERE CONTAINED IN THE SEARCH WARRANT BEFORE THEM; AND,

II.

WHETHER, HAVING FABRICATED THE FACTS ESSENTIAL TO A DENIAL OF APPELLATE RELIEF, AND REQUIRING DISMISSAL OF THEIR CRIMINAL APPEAL, THE COURT OF APPEALS, BY RESORTING TO ITS OWN RULE 24, WHICH PERMITS NON-PUBLICATION OF CERTAIN OPINIONS, MEETING DEFINED CRITERIA, UNCONSTITUTIONALLY COVERED UP ITS OWN WRONGDOING; AND TO THE EXTENT THAT SUCH AN EVENTUALITY REMAINS AN ONGOING AND CONTINUING POSSIBILITY, DOES RULE 24 OF THE SIXTH CIRCUIT COURT OF APPEALS VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION, WHICH ENSURES EVERY LITIGANT A FAIR HEARING BEFORE A FAIR TRIBUNAL, WHOSE JUDGMENTS ARE SUBJECT TO PUBLIC, AND NOT LIMITED SCRUTINY?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The only parties to the proceedings below have been the petitioners, SAMUEL MORRIS CURRY and RAMONA MARSHALL, and the United States Attorney for the Eastern District of Michigan, Southern Division, at Detroit, ROY C. HAYES, and Assistant United States Attorney, LAWRENCE J. BUNTING, 817 Federal Building, Detroit, Michigan 48226.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
REFERENCE TO UNOFFICIAL OPINION OF COURT OF APPEALS	1
JURISDICTION	2
THE CONSTITUTIONAL PROVISIONS INVOLVED	2
CONCISE STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI	10
CONCLUSION	21

APPENDIX:

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	A-1

TABLE OF AUTHORITIES

Page

CASES:

Alderhold v. *United States*, 132 F.2d 858 (5th Cir. 1943) 12

Bowen v. *Mich. Academy of Family Physicians*, 476 US ___, 90 LEd2d 623, 106 SCt 2133 (1987) 18

Brinegar v. *United States*, 338 US 160, 69 SCt 1302, 93 LEd 1879 (1949) 17

Carney v. *United States*, 163 F.2d 784 (9th Cir. 1947), *cert. denied*, 332 US 824, 68 SCt 165, 92 LEd 400 (1947) 12

Carroll v. *United States*, 267 US 132, 45 SCt 280, 69 LEd 543 (1924) 12

Giordenello v. *United States*, 357 US 480, 78 SCt 1245, 2 LEd2d 1503 (1958) 17

Illinois v. *Gates*, 462 US 237, 103 SCt 2317, 76 LEd2d 527 (1983) 14

Jones v. *United States*, 362 US 257, 80 SCt 725, 4 LEd2d 697 (1960) 15, 17

Rosencranz v. *United States*, 356 F.2d 310 (1st Cir. 1966) 11

Townsend v. *Burke*, 334 US 736, 92 LEd 1690, 68 SCt 1252 (1947) 10

United States v. *Anderson*, 453 F.2d 174 (9th Cir. 1971) 13

United States v. *Birrell*, 242 F.Supp. 191 (1965) 13

Page

United States v. *Brouillette*, 478 F.2d 1171 (5th Cir. 1973) 13

United States v. *Eisner*, 297 F.2d 595 (6th Cir. 1962), *cert. denied*, 369 US 859, 82 SCt 947, 8 LEd2d 17 (1962) 11

United States v. *Freeman*, 358 F.2d 459 (2nd Cir. 1966), *cert. denied*, 385 US 882, 87 SCt 168, 17 LEd2d 109 (1966) 11

United States v. *Harris*, 403 US 573, 91 SCt 2075, 29 LEd2d 723 (1971) 17

United States v. *Hatcher*, 473 F.2d 321 (6th Cir. 1973) 6, 10-11, 17

United States v. *Leon*, 468 US 897 (1984) 8

United States v. *Longman*, 533 F.Supp. 176 (WD Mich. 1982) 13

United States v. *Pelham*, 801 F.2d 875 (6th Cir. 1986), *cert. denied*, 107 SCt 1035 (1987) ... 8, 12

United States v. *Pinkerman*, 374 F.2d 988 (4th Cir. 1967) 11

United States v. *Plemmons*, 336 F.2d 731 (6th Cir. 1964) 12

United States v. *Roth*, 391 F.2d 507 (7th Cir. 1967) 13

United States v. *Savoca*, 761 F.2d 292 (6th Cir. 1985), *cert. denied*, 474 US 852 (1985) 8

United States v. *Spilotro*, 800 F.2d 959 (9th Cir. 1986) 13

United States v. *Sterling*, 369 F.2d 799 (3rd Cir. 1966) 11

Page

United States v. *Tucker*, 404 US 443, 30 LEd2d 592, 92 SCt 589 (1972) 10

Whitley v. *Warden*, 401 US 560, 91 SCt 1031, 28 LEd2d 306 (1971) 13

CONSTITUTIONAL AND STATUTORY AUTHORITY:

Title 18, U.S.C. § 2 3

Title 18, Appendix, U.S.C. § 1202(a)(1) 3

Title 18, U.S.C. § 3772 2

Title 21, U.S.C. § 841(a)(1) 3

US Const, Amend IV 2-3

US Const, Amend V 3

MISCELLANEOUS:

Fed. R. Crim. P. 41(c) 10-11

US Court of Appeals for the Sixth Circuit Rule 15, Internal Operating Procedures 2

US Court of Appeals for the Sixth Circuit Rule 24 19-20

US Supreme Court Rule 20.1 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

SAMUEL MORRIS CURRY & RAMONA MARSHALL, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above-entitled case on December 14, 1987.

REFERENCE TO UNOFFICIAL OPINION OF COURT OF APPEALS

The opinion of the Court of Appeals is non-published, consists of but two typewritten double-spaced letter-sized pages, and is duplicated at page A-1 of the Appendix to the within petition for certiorari.

JURISDICTION

The within petition seeks review of a non-published opinion and judgment of the Sixth Circuit Court of Appeals, entered December 14, 1987, affirming a Criminal Conviction for violation of the Controlled Substances Laws of the United States, originating in the United States District Court for the Eastern District of Michigan, at Detroit, entered by the Sixth Circuit Court of Appeals, under provisions of Sixth Circuit Rule 24, allowing entry of non-published opinions according to enumerated criteria, here challenged, to the extent that the said criteria diminish appellate rights generally by permitting the Court of Appeals to distort and misapply the facts upon which an appeal might rest, in complete derogation of the constitutionally guaranteed right to appellate due process, and review thereof, within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

The within application to review a judgment of a Federal Appeals Court is timely filed in accordance with the requirements of the United States Supreme Court Rule 20.1; Rule 15 of the Internal Operating Procedures of the Sixth Circuit Court of Appeals; and § 3772 of Title 18 U.S.C.

THE CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Amend IV:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, *and no warrants shall issue, but upon probable cause, supported by oath or affirma-*

> *tion, and particularly describing the place to be searched, and the persons or things to be seized.*

US Const, Amend V:

> No person shall . . . be deprived of his life, *liberty*, or property, *without due process of law*; . . . .

CONCISE STATEMENT OF THE CASE

Originally, both petitioners were indicted in a Joint Indictment, returned 10/22/86, charging them, in count one, with knowingly, intentionally and unlawfully possessing with intent to distribute, approximately 1096.29 grams of cocaine, a Schedule II Narcotic Substance, in violation of § 841(a)(1), Title 21 U.S.C., and § 2, Title 18 U.S.C.; and charging petitioner, Curry, with the additional offense of Possession of a Firearm by a Convicted Felon, under § 1202(a)(1), Title 18, Appendix, U.S.C.

A Rule 11 Agreement was entered into between the petitioners and the Government, whereby they were permitted to enter guilty pleas as to the Narcotics count, and to preserve for review on appeal the issue of the propriety of the District Judge's denial of their Motion to Quash the Search Warrant used to justify the seizure of the drugs in question from within certain premises in the City of Detroit.

Following their sentencing, on March 19, 1987, and admission to bail on appeal, the petitioners pursued their appellate rights before the Sixth Circuit Court of Appeals; and there urged just one simple legal matter: namely, that the trial Judge erred in holding valid a search warrant affidavit which was, on its face, totally devoid of any averments "particularly describing the

situs where contraband had been seen or would likely be found."

The affidavit undergirding the search warrant in question read as follows:

AFFIDAVIT

Special Agent Kenneth J. Johnston, Drug Enforcement Administration (DEA), being duly sworn, deposes and state[s] the following:

1. The affiant has been a Special Agent of the DEA for approximately two and one half years.

2. The affiant has been conducting a narcotics investigation on a subject known as Samuel Curry and has been informed by Officer Kenneth Surma, Detroit Police Department, that:
   a) On February 12, 1985, the Detroit Police Department Narcotics Unit executed a state search warrant on a residence he knew to be Samuel Currys' *at 12061 Chelsea, Detroit, Michigan.* The Detroit Police Department confiscated approximately 585 grams of a white powder substance analyzed as cocaine and approximately $190,000.00 cash from within the residence. At the time of the execution of the search warrant Samuel Curry was not in the residence.
   b) A blue 1985 Corvette with Michigan license 345 NVA was seized from 12061 Chelsea, Detroit, Michigan, upon execution of the search warrant on February 12, 1985. The vehicle was subsequently returned to the registered owner, Carolyn

Phelan, *5899 Big Pine Ct., Ypsilanti, Michigan,* who told the Detroit Police Officers she lent her vehicle to Samuel Curry.

c) Officer Serma knows from prior surveillance that Samuel Curry also drives a 1985 Red Pontiac Fiero bearing Michigan license 118 NYK registered to Lenora Curry Hampton, *8320 Robson, Detroit, Michigan.*

3. That within the last 48 house (*sic,* hours) of the date hereof a confidential informant has been inside *the above described premises* and observed a large quantity of a white powdery substance located in the kitchen of the residence. The informant believes this substance to be cocaine based upon his/her observation and knowledge. The affiant knows the informant is familiar with cocaine and its identifying characteristics.

4. That the confidential informant has been cooperating with the DEA for approximately two months and during this time has provided narcotic related information on approximately ten occasions. This information has consisted of names, addresses, vehicle descriptions and telephone numbers of known narcotic traffickers. This information has been independently corroborated by the affiant and other law enforcement officers through various sources of information.

5. That the confidential informant has seen Samuel Curry at 18701 Helen, Detroit, Michigan, on previous occasions within the last month, and has reason to believe that

he shares the house with Ramona Marshall a/k/a Yolanda Wells.

6. That the affiant has confirmed the utilities and telephone number at 18701 Helen, Detroit, Michigan are in Ramona Marshall's name.

7. That the affiant has observed the above mentioned 1985 blue Corvette parked in front of 18701 Helen on the mornings of November 21, and 22, 1985.

8. That the affiant has observed the above mentioned 1985 red Pontiac Fiero parked in the driveway of 18701 Helen on November 21, 1985.

9. That the affiant knows Samuel Morse [*sic*] Curry has been arrested *in the past* for various offenses including a drug offense.

10. That the affiant knows from personal experience as a Special Agent with the DEA that those who traffic in narcotics generally keep firearms on the premises to protect the narcotics they distribute and the proceeds of said narcotic distribution.

SPECIAL AGENT KENNETH J. JOHNSTON
Drug Enforcement Administration

Subscribed and sworn to before me
this 24th day of November, 1985.

HONORABLE LYNN V. HOOE, JR.
United States Magistrate

Citing the Sixth Circuit's own ruling in *United States* v. *Hatcher*, 473 F.2d 321, 324 (6th Cir. 1973), in which it had stated that under Fed. R. Crim. P. 41(c),

affidavits for search warrants must themselves contain all of the facts and circumstances which give rise to a search of a specific premises, the Court then went on, on the basis of the affidavit set forth above, to state that the contested affidavit clearly described a place where drugs were to be sought, and would likely be found. Their opinion is as follows:

OPINION OF THE APPEALS COURT

PER CURIAM. Defendants Samuel Curry and Ramona Marshall have pleaded guilty to possession of a controlled substance and are, pursuant to the terms of their plea agreement, appealing the validity of the search warrant issued against Marshall's apartment on November 24, 1985.

The instant dispute centers on interpretation of the affidavit issued in support of the warrant by Drug Enforcement Agency agent Kenneth Johnston to Magistrate Lynn V. Hooe, Jr. The affidavit alleged, in pertinent part, that informant had been "inside the above-described premises and observed a large quantity of white powdery substance located in the kitchen of the residence." Appellants contended that since three addresses were mentioned in the affidavit, it was impossible to ascertain *which* particular premises were "above-described" or "the residence."

Upon inspection of the text of the affidavit and the totality of the record, this court finds that the warrant was not so ambiguous as to impinge upon constitutional standards. "Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *United States* v.

Pelham, 801 F.2d 875, 877 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1035 (1987). Furthermore, an issuing magistrate's probable cause determination should not be set aside unless arbitrarily exercised." *Id.* at 877.

In the case at bar it is clear that even though three addresses were mentioned, only Marshall's residence was "described" in the remainder of the affidavit. Moreover, the other two addresses could not be considered "*the* residence" of Marshall or Curry since both were living in Marshall's apartment during the relevant time period. Accordingly, the affidavit was sufficiently precise to provide probable cause for the issuance of the warrant.

Alternatively, the arresting officer's good faith reliance on the affidavit defeats any argument that suppression of the evidence is in order. *United States* v. *Leon*, 468 U.S. 897 . . . ; *United States* v. *Savoca*, 761 F.2d 292 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985). Even if no probable cause existed, appellants did not show that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence *entirely* unreasonable." *Leon*, 468 U.S. at 923. Accordingly, good faith reliance provides an alternative basis for this court's holding. The District Court's decision is AFFIRMED.

It is apparent from a comparison of the affidavit set forth hereinabove, and the opinion of the Court of Appeals that the Court of Appeals distorted and misquoted the evident facts involved, as a means of reaching its result. For, nowhere in the clauses of the affidavit being reviewed could it possibly be claimed that the unnamed informant observed drugs, at any

place other than *three* addresses listed *above*, one of which was described as "the residence" of Samuel Curry, at 12061 Chelsea St., Detroit, Michigan, not 18701 Helen St., the premises actually searched, which latter premises were only tangentially mentioned in paragraph "5" of the affidavit, as being the residence of Ramona Marshall, without any further notation or significant fact.

Furthermore, for the Appeals Court to state, as it did in its opinion, page 8 *supra*, that "both were living in Marshall's apartment during the relevant time period," when the affidavit itself, in paragraph "5" thereof, simply stated, "*That the confidential informant has seen Samuel Curry at 18701 Helen, Detroit, Michigan, on previous occasions within the last month, and has reason to believe that he shares the house with Ramona Marshall,*" is more than this writer can fathom, and especially where paragraph 2(a) of the affidavit avers that 12061 Chelsea was known by the informant to be Samuel Curry's "residence." Not one single averment, or combination of averments supports the claims of the Appeals Court Judges, that they "both were living in Marshall's apartment during the relevant time period." A statement of belief, which is nowhere supported by fact, amounts to exactly nothing for probable cause purposes.

It is because the petitioners believe they are entitled to a decision based upon an accurate recitation of the pertinent facts, and because they believe no court has the constitutional right to deliberately fabricate the facts in order to reach a certain decision, that petitioners are filing the within petition for certiorari with the Supreme Court, to review and reverse the action of the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

It has been the holding of the Supreme Court, ever since the case of *Townsend* v. *Burke*, 334 US 736, 740, 741, 92 LEd 1690, 1693, 68 SCt 1252 (1947), that any judgment of any court which is made on the basis of false assumptions, or *by a misreading of the record in question*, is inconsistent with due process of law, and must be vacated. That Court stated that whether this happens through carelessness or design, the result cannot be allowed to stand, as constitutional due process would be violated.

Similarly, in *United States* v. *Tucker*, 404 US 443, 447, 30 LEd2d 592, 596, 92 SCt 589 (1972), it was reaffirmed that a judgment based upon materially untrue assumptions violates constitutional due process.

Certiorari should especially be granted in this case to compel some degree of uniformity of decision-making within appellate circuits. The within case does not involve any complicated set of facts capable of being given severally equally plausible interpretations.

Here we have an affidavit which speaks for itself, and which, according to the pronouncements of the Sixth Circuit, must stand or fall on its own, based solely upon a review of the four corners of the affidavit. That has been the rule in the Sixth Circuit, as is clear from the following:

The Sixth Circuit Court of Appeals, in *United States* v. *Hatcher*, 473 F.2d 321 (6th Cir. 1973), had the following to say of Affidavits for Search Warrants, on page 324 of the reported opinion:

> The warrant to search Room 165 was issued pursuant to Fed.R.Crim.P. 41(c), which states,

> "A warrant shall issue *only on affidavit* sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant . . . ." (emphasis added)

We, therefore, reaffirm the requirement that all facts and circumstances relied upon for the issuance of a federal warrant be found in the written affidavit. This ensures that the commissioner may judge for himself the persuasiveness of the precise facts relied on to show probable cause and that the reviewing court may determine whether the constitutional requirements have been met without reliance upon faded and often confused memories. The District Court erred in denying appellants' motion to suppress the evidence seized in Room 165. [1]

We recognize that as stated in *United States* v. *Eisner*, 297 F.2d 595, 597 (6th Cir. 1962), *cert. denied* 369 U.S. 859, 82 SCt 947, 8 L.Ed.2d 17 (1962):

> "In determining what is probable cause, the Commissioner is not called upon to determine whether the offense charged has in fact been committed. He is concerned only with the question whether there is reasonable grounds to believe at the time of the

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[1] Accord: *Rosencranz* v. *United States*, 356 F.2d 310 (1st Cir. 1966); *United States* v. *Freeman*, 358 F.2d 459 (2nd Cir. 1966), *cert. denied*, 385 US 882, 87 SCt 168, 17 LEd2d 109 (1966); *United States* v. *Sterling*, 369 F.2d 799 (3rd Cir. 1966); *United States* v. *Pinkerman*, 374 F.2d 988 (4th Cir. 1967).

> affidavit that the law was being violated *on the premises to be searched. Carney* v. *United States*, 163 F.2d 784, 786, C.A. 9th, *cert. denied* 332 U.S. 824, 68 S.Ct. 165, 92 L.Ed. 400; *Alderhold* v. *United States*, 132 F.2d 858, C.A. 5th. See *Carroll* v. *United States*, 267 U.S. 132, 161, 45 S.Ct. 280, 69 L.Ed. 543."

And certainly we do not disagree with the statement in *United States* v. *Plemmons*, 336 F.2d 731, 734 (6th Cir. 1964):

> "In testing the sufficiency, the affidavit must be read as a whole."

[6] Unfortunately, while we adhere to the statement made in *Eisner* and accept it as good law we cannot find sufficient facts in the affidavit in this case to justify the issuance of a search warrant. *There are no facts set forth in the affidavit which would justify a finding of probable cause to authorize the issuance of a warrant to search the premises at 1146 Laidlaw.* The motion to suppress the evidence secured in the search should have been granted.

That is the law which has prevailed within the Sixth Circuit up until the within case, and it is apparent as we review the affidavit above that that rule was deliberately sidetracked; and to make it seem that the law was not being put on hold in this individual case, the justices then went on to cite the case of *United States* v. *Pelham*, 801 F.2d 875, 876, a 1986 Sixth Circuit Court case, as being on a par with the appeal they were deciding.

Yet, one has only to look briefly at the *Pelham* case to see that it is in no way similar to the within case.

For, in *Pelham*, unlike the situation involving the within appellant, the affidavit supporting the search warrant in question specifically recited the place where the illegal narcotic activity had transpired, both by address, and by specific reference to a named person who stated that he had seen the storing and selling of marijuana within that address, within the last 24 hours.

Had such averments been detailed in the within case, then surely there would be no cause for taking issue with the findings of the Court of Appeals; but there simply were no such averments — and, most importantly, the Court of Appeals knew that there were none. That is what vitiates the judgment of the Court of Appeals, on due process grounds.

There are *no facts* set forth in the affidavit here to justify the issuance of a warrant to search the premises described as 18701 Helen St., Detroit, Michigan.[2] Cf. also, *United States* v. *Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986); and *United States* v. *Birrell*, 242 F.Supp. 191, 202, hdnote [6] (1965).

As we attempt to analyze the affidavit in this case, we find that the only language set forth therein re-

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[2] *United States* v. *Longman*, 533 F.Supp. 176 (WD Mich. 1982) affirms the same principle. At headnotes [4,5] of the opinion, on page 181 thereof, the Court stated: "In determining the sufficiency of the affidavit, this Court is concerned *exclusively with the statements of fact contained within the affidavit itself. Whitley* v. *Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) . . ." Thus the warrant and its affidavit must stand or fall on the facts as stated within them. *United States* v. *Brouillete*, 478 F.2d 1171 (5th Cir. 1973). This ensures that the reviewing court determine the issue of whether or not the affidavit is sufficient without relying upon faded and confused memories. *United States* v. *Anderson*, 453 F.2d 174, 177 (9th Cir. 1971). *Moreover, such strict requirements ensure that the magistrate's function not be reduced to one of acting as a rubber stamp for the police. United States* v. *Roth*, 391 F.2d 507, 511 (7th Cir. 1967).

garding any illicit drugs is contained in paragraph three (3) thereof, and that language plainly states:

> 3. That within the last 48 hours of the date hereof a confidential informant has been inside *the above described premises* and observed a large quantity of a white powdery substance ... etc. (See page 5 of this petition)

The only "*above described premises,*" set forth in the affidavit are *12061 Chelsea,* Detroit, Michigan; *5899 Big Pine Court,* Ypsilanti, Michigan; and *8320 Robson St.,* Detroit, Michigan.

In *Illinois* v. *Gates,* 462 US 237, 103 SCt 2317, 2332, 76 LEd2d 527 (1983), the Supreme Court had this to say:

> For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli.* In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations.

But then, the Court went on to say:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is *a fair probability that contraband or evidence of crime will be found in a particular place.* And the duty of a reviewing court is simply to ensure that the magistrate had a "*substantial basis for ... concluding*" that probable cause

> existed. *Jones* v. *United States*, 362 U.S., at 271, 80 S.Ct., at 736. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

How anyone reading the affidavit in the within case could conclude that the reference to cocaine being seen upon "the above described premises," could relate to the Helen St. address *where that address was not "above described" in the affidavit*, is more than this writer can see.

The informant does not state that he saw cocaine in any specific place. And yet he is required to make that showing. He must show that a search of a particularly and definitely described place would probably and likely uncover wrongdoing there. *The affidavit in the within case sets forth three discrete addresses "above"* the reference made to cocaine. No one could possibly know, as he reads the affidavit in this case, just where it was that the informant made his observations.

The body of the affidavit, following the reference to the sighting of a white powdery substance which the informant believed was cocaine, does mention the Helen St. premises, but only in paragraphs 5, 6, 7, and 8. Paragraph 5 indicates that the confidential informant had *seen* Samuel Curry at 18701 Helen. Paragraph 6 mentions that the *utilities* were listed in the name of Samuel Curry's girl friend, Ramona Marshall; and paragraphs 7 and 8 that a blue Corvette and a red Fiero were *parked* at the home three days earlier.

None of these averments is significant, or probative of any wrongdoing. Certainly the fact that the appellant

Curry had been *arested* at some unspecified time in the past for *a* narcotics offense is probative of nothing; and additionally, a seizure at a home on Chelsea St., almost a year earlier, which was not directly connected with Mr. Curry, would not furnish any basis for concluding that another house on Helen St. would, in November of that year, likely contain cocaine, or some other controlled substance.

The Sixth Circuit cases have all heretofore stated that the required probable cause must derive only from those *facts which were sworn to before the Magistrate,* and none other. Thus, in this case, where the affidavit itself recites that the agent was sworn with reference to only those averments which were numbered paragraphs One (1) to Ten (10), it is virtually impossible to go outside of the affidavit to incorporate the caption to the search warrant into the sworn body of facts given the Magistrate.

But, even if such could be done, *which it cannot,* matters would only become more confused; for now, instead of there being three "above described premises," there would be four. How could anyone know upon which of these *four* premises the white powdery substance was observed?

Notably absent from the entire affidavit is any suggestion on the part of the affiant that he believed there was probable cause to believe that contraband was to be found on any named premises.

The affidavit talks about what was found at a Chelsea St. address 10 months earlier; but even had Mr. Curry been seen on those premises some 10 months before the warrant in this case was sought, his *presence* at the Helen St. address, without more, could not justify the search of that place. As this very Court

stated in *United States* v. *Hatcher*, 473 F.2d 321, on page 323:

> The mere fact that two persons known to have been engaged in trafficking in narcotics were observed on the same premises cannot justify a search of the premises without something more.

There certainly is little need in this case to beat a dead dog around a stump; the issue presented by the petitioners is not complicated. There simply is no averment, or combination of averments set forth in the affidavit, to permit the Court of Appeals to suggest that there was a "substantial basis" for believing that the affidavit in this case pointed reasonably to any one place where contraband would likely be found, and certainly not to the Helen St. premises for which the search warrant was issued.

"Probable cause" has never been simply a matter of a choice of probabilities. *Brinegar* v. *United States*, 338 US 160, 175, 69 SCt 1302, 93 LEd 1879, 1890 (1949); *United States* v. *Harris*, 403 US 573, 577-583, 91 SCt 2075, 29 LEd2d 723 (1971); *Jones* v. *United States*, 362 US 257, 271, 80 SCt 725, 736, 4 LEd2d 697 (1960); *Giordenello* v. *United States*, 357 US 480, 483, 78 SCt 1245, 1248, 2 LEd2d 1503 (1958). "Probable cause" has to be more than a coin toss, or a crap shoot, or a guessing game. Yet, in this case, the process of finding that the affidavit here involved points to the Helen St. address as being a place where narcotics would likely be found boils down to *much less than a coin toss*, or a deciding between one of several equally plausible possibilities.

When we look to the Appeals Court decision, it is virtually impossible to assign any serious importance to the following portion of that decision, to-wit:

> In the case at bar it is clear that even though three addresses were mentioned, only Marshall's residence was "described" in the remainder of the affidavit. Moreover, the other two addresses could not be considered "*the* residence" of Marshall or Curry since both were living in Marshall's apartment during the relevant time period. Accordingly, the affidavit was sufficiently precise to provide probable cause for the issuance of the warrant.

What if Marshall's, or any other person's "residence was 'described' in the remainder of the affidavit," the question is not the mere mention of a term "residence," although it is certainly clear that that term is used in paragraph 2(a) of the affidavit in respect to Samuel Curry, but rather whether, as we view the affidavit as a whole, it can be inferred that the place the informant was referencing is "particularly described," as the Constitution requires in the Fourth Amendment.

The Court of Appeals knows what the law requires. Those judges cannot be presumed to be idiots or stupid. They are lawyers, with the ability to make fine distinctions, and to draw reasonable conclusions from language that comes before them.

Their decision in the within case is clearly based upon false assumptions, and a serious misreading of the record submitted in the case as to require review.

Additionally, review via Certiorari should be granted as a prophylactic measure. If appeals are to be allowed litigants, as the Congress has so provided by its laws, then it must be assumed that appellants are to be afforded a real, not imaginary, right of review. Recently, in *Bowen* v. *Mich. Academy of Family Physi-*

cians, 476 US ___, 90 LEd2d 623, 628, 106 SCt 2133 (1987), the Supreme Court pointed out that the Statutes of Congress are not merely advisory when they relate to administrative agencies; and these petitioners would urge that neither are they merely advisory when they create remedies in the courts. The courts cannot make a mockery out of the process of judicial review.

Judicial review, if it is to mean anything, has to be real. It cannot be based upon distortions of the record brought up for review. Yet, that is what has happened here. The factual record has been contorted to make it fit into the container fashioned by the prior decisions of not only the Sixth Circuit Court of Appeals, but the Supreme Court itself.

And then, to add insult to injury, the Court has adopted Rule 24 as an internal rule which allows its decisions to be entered without publication, under the following circumstances:

> *(a) Criteria for Publication.*
>
> (1) The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:
>
> (i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
>
> (ii) whether it creates or resolves a conflict of authority *either within the circuit* or between this circuit and another;

(iii) whether it discusses a legal or factual issue of continuing public interest;

(iv) whether it is accompanied by a concurring or dissenting opinion;

(v) whether it reverses the decision below, unless: (a) the reversal is caused by an intervening change in law or fact, or, (b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

(vi) whether it addresses a lower court or administrative agency decision that has been published; or,

(vii) whether it is a decision which has been reviewed by the United States Supreme Court.

Rule 24(a)(ii), which relates to conflicts within a circuit, is the one which the petitioners say impermissibly allows the Court to circumvent the intent of Congress that appeals be allowed, and be realistically related to prior decisions of a court; for if, as here, a decision which is based upon a clear distortion of the facts remains as a matter simply between the litigants themselves; and if the public never gets to see the shennanigans going on, then justice is effectively denied the litigants.

Publication of opinions serves a valuable public interest. Everyone knows why courts are open to the public, and the light of public review. Court-watchers serve an interest protected by the Due Process Clause

of the Constitution; and likewise, publication of the opinions of judges who sit out of sight in Cincinnati, and deal with their briefs and pleadings, within the confines of their chambers, becomes even more important than court-watching could ever be at the lower court level.

Here, in this case, petitioners contend that Rule 24 of the Sixth Circuit is being used to make possible the denial to the petitioners of a fair hearing, to which they are clearly entitled under both the statutory law, and the Constitution.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 8, 1988

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

(United States Court of Appeals — Sixth Circuit)

(Entered December 14, 1987)

(SAMUEL MORRIS CURRY and RAMONA MARSHALL, Defendants-Appellants, v. UNITED STATES OF AMERICA, Plaintiff-Appellee — No.: 87-1313)

BEFORE: MERRITT and KRUPANSKY, Circuit Judges; and RYAN, Senior Circuit Judge.

PER CURIAM

Defendants Samuel Curry and Ramona Marshall have pleaded guilty to possession of a controlled substance and are, pursuant to the terms of their plea agreement, appealing the validity of the search warrant issued against Marshall's apartment on November 24, 1985.

The instant dispute centers on interpretation of the affidavit issued in support of the warrant by Drug Enforcement Agency agent Kenneth Johnston to Magistrate Lynn V. Hooe, Jr. The affidavit alleged, in pertinent part, that informant had been "inside the above-described premises and observed a large quantity of white powdery substance located in the kitchen of the residence." Appellants contended that since three addresses were mentioned in the affidavit, it was impossible to ascertain *which* particular premises were "above-described" or "the residence."

Upon inspection of the text of the affidavit and the totality of the record, this court finds that the warrant was not so ambiguous as to impinge upon constitu-

tional standards. "Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *United States* v. *Pelham*, 801 F.2d 875, 877 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1035 (1987). Furthermore, an issuing magistrate's probable cause determination should not be set aside unless arbitrarily exercised." *Id.* at 877.

In the case at bar it is clear that even though three addresses were mentioned, only Marshall's residence was "described" in the remainder of the affidavit. Moreover, the other two addresses could not be considered "*the* residence" of Marshall or Curry since both were living in Marshall's apartment during the relevant time period. Accordingly, the affidavit was sufficiently precise to provide probable cause for the issuance of the warrant.

Alternatively, the arresting officer's good faith reliance on the affidavit defeats any argument that suppression of the evidence is in order. *United States* v. *Leon*, 468 U.S. 897 . . . ; *United States* v. *Savoca*, 761 F.2d 292 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985). Even if no probable cause existed, appellants did not show that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence *entirely* unreasonable." *Leon*, 468 U.S. at 923. Accordingly, good faith reliance provides an alternative basis for this court's holding. The District Court's decision is AFFIRMED.